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Supreme Court, U.S.
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No. 01 -1708

IN THE
Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON HBOC, INC., et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IRAN'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Whether the court below erred when it reversed the district court's grant of summary judgment, finding that Iran had raised genuine issues of material fact.

2. Whether the court below erred in not disturbing the district court's exercise of discretion in awarding simple, rather than compound, pre-judgment interest.

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COUNTERSTATEMENT OF THE CASE

In its filings at the Iran-United States Claims Tribunal ("Tribunal"), Iran did not rely on the "come to the company" "defense" as just establishing "custom and practice." Contra McKesson's Cross-Petition ("CP") 3. In its Complementary Statement of Defense filed with the Tribunal in 1983, McKesson's Lodging ("L") 182-186, Pak Dairy ("Pak") not only referred to the procedure as "the normal routine," L184, but also referred to it as involving "right[s]" and "legal" "obligat[ions]," L185. In consequence, when Iran first raised the "come to the company" defense in the district court, it did not "recast" the defense as a legal requirement, rather than just a "custom or practice." Contra CP 4.

McKesson's assertion, CP 3, that the Tribunal "was not persuaded" by the "defense" is incorrect. See infra, p.3 and n.1

In its decision on the cross-motions for summary judgment, the district court did not reject Iran's "come to the company" defense because it was "unsubstantiated by any credible evidence," as McKesson claims. CP 4. Rather, the district court specifically declined to rule on the conflicting evidence as to the existence of the requirement. It granted McKesson's motion, holding that even if there were such a "procedural" requirement, McKesson never knew about it and "it would have been futile for McKesson" to have attempted to comply with the requirement. Iran's Appendix ("PA") 111a-112a.

As we show infra, pp. 5-8, Iran did present "credible" "contemporaneous evidence" supporting its claim that Pak's board had adopted the "come to the company" requirement. Contra, CP 4.

McKesson's suggestion, CP 5, that the only reason that the district court gave for awarding simple interest as a matter of discretion was "the almost uniform practice of awarding only simple interest," is incorrect. The court also relied on the practice of the Tribunal and of the United States' Foreign Claims Settlement Commission in deciding claims for expropriation against Iran. The court did so because these "claims" were "directly comparable to Plaintiff's own." Cross-Petitioner's Appendix ("CA") 17a. The court found that these cases "and the other authorities supporting their practice," which the court had addressed earlier in the opinion, "offered persuasive guidance." Id. Thus, the court based its conclusion that simple interest was the appropriate award on all of these authorities and considerations.

As we show, infra, pp. 7-8, Iran did submit corporate documents supporting Mr. Dadyar's statement that Pak had adopted the "come to the company" requirement. Contra, CP 6.

McKesson's assertion, CP 6, that the court of appeals ignored "substantial record evidence" contradicting the Dadyar affidavits, and failed to take into account inconsistencies between Dadyar's affidavit and other affidavits, is incorrect. As we show, infra, pp. 8-11, no such record evidence or inconsistencies exist.

ARGUMENT

I. THE ASSERTED VIOLATIONS OF WELL-ESTABLISHED PRINCIPLES DO NOT MERIT REVIEW.

We do not agree that the court of appeals violated any "well-established principles" as McKesson contends. Even if

there were violations, McKesson has not shown that there is a split in the Circuits with respect to the principles, or any other reason why these issues merit review by this Court. See Rule 10 of the Rules of this Court.

We respond below to McKesson's points in roughly the order they were made by McKesson (although this sometimes leads to repetition because the arguments repeat). What we show, we submit, is that not only was the court of appeals correct that the genuine issues it identified prevented summary judgment for McKesson, but numerous other issues did as well. Indeed, Iran was entitled to summary judgment, not McKesson.

As we have stated, supra, p.1, the "come to the company" defense presented at the Tribunal was not exclusively a "custom and practice" defense. Contra, CP 6.

McKesson does not explain the basis for its assertion that Iran's "defense was unsuccessful" at the Tribunal. See CP 9. The Award, Foremost Tehran, Inc. v. Iran, 10 Iran-U.S.Cl.Tr.R. 228, 246-250 (1986), L171-225, never mentions the defense, and Iran's overall defense was successful. The Tribunal rejected McKesson's expropriation claim. We think the implication of the Award is that the Tribunal accepted the defense.[1]

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[1] The Tribunal's jurisdictional cut-off date was January 18, 1981. Its rulings on Iran's liability for the dividends due in 1979 and 1980 and for expropriation were made as of that date. As Iran reads the Award, Iran was found liable for the dividends due in 1979 and 1980 as of January, 1981, because the dividends were overdue on that date and there was a telex from Pak Dairy, unretracted as of that date, stating that McKesson would not be paid regardless of what it did. Implicitly, the Tribunal ruled that McKesson was excused from compliance with the "come to the company" rule as to these dividends on the ground of futility. Iran, however, was not liable for the dividends due in 1981 and

Despite McKesson's suggestion to the contrary, CP 9, Iran raised the "come to the company" defense at the proper time in the litigation, that is, when the cross-motions for summary judgment, filed in 1996, first presented the parties' arguments on the merits. The defense was always a legal as well as a "custom and practice" defense. We cannot agree, for reasons we give in detail infra, pp. 5-8, that there was not "any evidentiary support" that it was a "requirement under Iranian corporate law" or one "adopted by Pak Dairy's board of directors." Contra CP 9.

A. THE COURT OF APPEALS VIOLATED NO WELL-ESTABLISHED PRINCIPLES IN REVERSING THE SUMMARY JUDGMENT IN FAVOR OF MCKESSON.

We have no quarrel with McKesson's recitation of "well-established principles" that govern summary judgment, CP 10-12. We disagree, however, that the court of appeals violated them in setting aside the summary judgment.

We disagree, contra CP 12, that the "come to the company" requirement was a "defense" in the sense that Iran had the initial burden of disproving that McKesson had been

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thereafter and not liable for expropriation because in the two late 1981 telexes Pak Dairy announced its "readiness" to pay dividends once again. That is, once Pak Dairy announced its willingness to pay, McKesson no longer had a futility defense and the "come to the company" requirement was recognized as valid. See Foremost Tehran, supra, at 246-250, L203-207. The implication that the Tribunal accepted the "come to the company" "defense" is fair because "readiness" to pay by Pak - without actually paying - would not be a defense to a charge of failure to pay overdue dividends unless McKesson was required to meet some precondition to payment such as failure to comply with the "come to the company" requirement.

unlawfully deprived of its dividends. McKesson, as plaintiff, had the initial burden to demonstrate that under the applicable law it was entitled to relief. McKesson made no attempt, by submitting an opinion on Iranian law, to do so. Iran attempted to demonstrate, by submitting opinions on Iranian law, that McKesson could not meet its burden under the applicable law because McKesson had not complied with the "come to the company" requirement. That attempt did not shift the initial burden to Iran.[2]

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[2] Under non-discriminatory Iranian law, the burden is on a plaintiff stockholder to establish that he has been illegally deprived of his dividends. E.g., First Fakhari Legal Opinion, ¶¶13-15, 39; JA 344-345, 354. Iran attempted to persuade the district court and the court of appeals that if a Pak stockholder did not comply with the "come to the company" requirement, he was not entitled to his dividends under Iranian law. The court of appeals remanded for a trial on whether Pak had in fact adopted the requirement.

What the court of appeals failed to note was that, even if the district court found on remand that Pak had not adopted the procedures, that would not suffice to show that Pak had illegally denied McKesson its dividends. McKesson made no attempt to show what procedures Pak's board had adopted for the distribution of dividends that Pak had not complied with in this case.

McKesson never submitted a legal opinion arguing that, pursuant to Iranian law, or Pak's articles, or a decision of Pak's board, Pak was legally required to mail McKesson a check, as is typically done in the United States. Mailing a check would have been completely futile, because the dividend was payable in Iranian rials. Pak could not on its own convert the rials into dollars. That required action by the Iranian central bank. As to establishing a bank account and transferring the dividends to it, McKesson made no attempt to show that Pak was legally obligated to set up such a bank account, much less transfer the dividends.

In effect, McKesson's position was that because it did not receive its dividends, Pak, and because Iran controlled it, Iran, was legally at fault. McKesson, however, never provided an opinion on Iranian law showing that Pak was under any legal obligation to do anymore than credit the dividends to McKesson's account, which is

B. THE COURT OF APPEALS DID NOT OVERLOOK ANY IMPORTANT EVIDENCE THAT JUSTIFIED THE DISTRICT COURT'S SUMMARY JUDGMENT AWARD.

1. PROBATIVE EVIDENCE FULLY SUPPORTED DADYAR'S AFFIDAVITS ON THE "COME TO THE COMPANY" REQUIREMENT AND THERE WAS NO SIGNIFICANT EVIDENCE TO THE CONTRARY.

McKesson seeks to rely on the principle that a party cannot avoid summary judgment by relying on "unsupported affidavits." See CP 10. That is not the case here. Dadyar's affidavits were well-supported. The court of appeals' statement that Dadyar's affidavits referred to "no documents supporting his assertion" or that they were, more generally, "unsupported" with respect to the come to the company requirement, PA 13A, should be read together with the district court's finding to which the statement refers.

When ruling on the cross-motions for summary judgment, the district court specifically recognized that he could not make a finding as to the existence of the requirement, because to do so would require him to resolve a genuine issue as to the meaning of the Persian word "*moradje'e*."[3] As we

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what Pak did.

[3] By a translator's affidavit, McKesson put in issue the accuracy of the translation of the Persian word "*moradje'e*" in two documents attached to Dadyar's affidavits, Pak's boards' minutes dated October 26, 1981, and a memo from Pak's managing director dated October 31,

pointed out, supra, p. 4, the court assumed the existence of the requirement but granted summary judgment against Iran regardless, because (1) "it was undisputed that McKesson never knew about [the requirement]," and (2) compliance with it would be "futile," PA 111a-112a.

In ruling against Iran on its two subsequent motions for summary judgment or reconsideration, the district court shifted ground. Placing the burden on Iran to prove the requirement, it denied Iran's two motions, because none of Pak's documents showed that Pak had "officially" or "formally" adopted a "binding" requirement. CA 26a-27a (2nd motion), 21a (3rd motion). Iran had not produced "any minutes of Pak Dairy's Board of Directors in which a 'come to the company' requirement was imposed." CA 21a.[4] We think this is all that

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1981, to Mr. Dadyar. Iran filed an opposing affidavit from another translator. JA 411-428; 465-466. Simplifying, the question was whether "*moradje'e*" meant "come to" the company physically or just contact it.

[4] In its second motion for summary judgment and first for reconsideration, Iran submitted legal opinions to the effect that the two issues based on which the district court had granted judgment for McKesson, (1) lack of knowledge, and (2) futility, would be resolved in favor of Pak by an Iranian court. McKesson submitted no opposing legal opinions. Unlike the ruling on the cross-motions, the district court's ruling on the second motion does not mention lack of knowledge and retracted its reliance on futility. CA 23a-28a and n. 3. As explained above, the court then – for the first time – resolved the issue of the existence of the "come to the company" requirement against Iran . The reason was not that the defense was unsubstantiated by "any credible evidence," see CP 4, but rather that Iran had not produced a document in which Pak had "officially" or "formally" adopted a "binding" requirement. CA 26a-27a.

In support of its third motion for summary judgment and second for reconsideration, Iran filed a legal opinion to the effect that, whatever other meanings "*moradje'e*" had in Persian, an Iranian court

the court of appeals meant by "no document" or "unsupported."

Otherwise, the court of appeals' finding is itself unsupported, not only by the district court's findings, but by the record as well, because the Dadyar affidavits were generally supported by perhaps a 100 pages of attachments from Pak's records in Persian and English. Among these were two exhibits to Dadyar's affidavits that specifically supported Dadyar's testimony that Pak had adopted the "come to the company" requirement. These were the two documents containing the Persian term "*moradje'e*." Properly translated, the documents showed that Pak's board and general manager believed that there was a "come to the company" requirement for the dividend declared in 1981 and followed it. Arguably, they showed that Pak's board had adopted the requirement, at least for 1981.[5] Copies of four receipts, signed on behalf of other

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would interpret "*moradje'e*" here to mean "come to the company" physically. Furthermore, this language "impos[ed] a legal requirement." Finally, even without any document showing that Pak had adopted the requirement, an Iranian court would rule for Pak, because, "[i]n Iran it is assumed that there is a legal a requirement of physically appearing at the company with a receipt." 4th Fakhari Legal Opinion, ¶¶8-9; JA 465-466; see CA 12a. McKesson did not file an opposing legal opinion on this point. The district court nevertheless denied Iran's motion. Its opinion does not provide further reasons on the "come to the company" point. Instead, the court restates that Iran did not produce the required document, and reinstates, without giving any substantive reason, its "futility" finding. CA 20a-22a.

[5] The minutes of Pak's board meeting of October 26, 1981, recorded the board's "deci[sion] to credit the dividend to foreign shareholders, like the previous years, to their account until they come to the company to collect it." Ex. 4 to 2nd Dadyar Affidavit, L294-298, see L297. The memo from Pak's Managing Director, dated October 31, 1981, to Pak's "Accounts Department," instructed that "[t]he foreign shareholders' profits will be credited to their account as in the past so

shareholders in 1981 and 1982 in accordance with the requirement, were also attached to one of the affidavits.

The two Dadyar affidavits were also generally supported by no less than 10 additional affidavits and legal opinions, plus supporting exhibits, on the issue of the requirement, as follows: 1. Pak was not in default because McKesson had not complied with the "come to the company" requirement (1st, 2nd, 3rd and 4th Fakhari Opinions, 1st Vafai Opinion, Yavari Opinion); 2. Pak had in fact adopted the "come to the company" requirement (Pezeshk Affidavit, 1st, 2nd, and 3rd Dadyar Affidavits); 3. The requirement was universal in Iran (Farid Affidavit, 1st Dadyar Affidavit, 1st Vafai Opinion); 4. An Iranian court would enforce the requirement even without the production of a board resolution showing that Pak adopted the requirement (4th Fakhari and 2nd Vafai Opinions). McKesson submitted no affidavits and no legal opinions taking issue with these affidavits and legal opinions on the issue of the requirement.

The evidence that McKesson now proffers to this Court as being contrary to Dadyar's affidavits, CP 13-17, is fully consistent with Iran's position. There was no reason for Mr. Patterson to know about the requirement or for Mr. Fisher to mention it in his affidavit. Fisher was the day-to-day manager of the dairy in Tehran, as well as McKesson's representative, and easily able to comply with the "come to the company" requirement on behalf of McKesson. There was no reason for

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that it could be paid to them upon their coming to the company." Handwritten on the memo was a note to "Mr. Dadyar, Please take action," "[s]hare dividend of the shareholders who did not come last year to collect their cheque ... be transferred to Account No. 2020." Exhibit 4 to 1st Dadyar Affidavit, L252-261, see L255, emphasis supplied.

the requirement to be mentioned in board meetings or in correspondence. As established by Iran's many affidavits and legal opinions, its existence was not an issue. We agree that the May, 1980 telex did not give as a reason for not paying dividends failure to comply with the requirement. As the Tribunal found, before 1981, Pak was "discriminating" against McKesson. L206. Contra CP 12-16. Finally, that documents produced by Pak in discovery do not mention the requirement is also consistent with Iran's position. The requirement, in Iran, is assumed. Contra CP 16-17.

In any event, McKesson proffered none of this evidence in its statement of material facts as to which there was no genuine issue in support of summary judgment. Nor would it have been useful to do so. None of this evidence was of the quality required by Rule 56, F.R.CivP. to establish that there was no genuine issue of material fact. None of it is an affidavit by a witness stating that he was at Pak during the relevant period (roughly 1977 through 1983) and Pak did not enforce a "come to the company" requirement. See Rule 56(e), F.R.Civ.P. Fisher was at Pak during the relevant period, but his affidavit does not address the issue.

Again, as shown above, p. 3, n. 1, the Tribunal's opinion never mentions the "come to the company" requirement, and its finding that Iran was liable for non-payment of the 1979 and 1980 dividends is implicitly consistent with acceptance of the requirement. Contra, CP 16.[6]

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[6] McKesson suggests that the Tribunal's purported ruling rejecting the "come to the company" requirement has "preclusive effect." CP 16. To begin with the Tribunal made no such ruling, See p. 3, and n. 1, supra. Moreover, McKesson waived the argument by not making it either in the district court or the court of appeals. The district court rejected Iran's argument that the Tribunal's finding that Pak was

The adverse inference rule does not come into play because, as we have shown, supra, p. 6-9, Iran produced powerful evidence that Pak had adopted the "come to the company" requirement. Contra CP 16-17

2. THERE WERE NO INCONSISTENCIES IN IRAN'S EVIDENCE ON THIS ISSUE.

McKesson quotes from the Pezeshk and the first two Dadyar affidavits, see CP 17-18, and argues that they are inconsistent. Mr. Pezeshk wrote that "to receive the dividends" McKesson could "refer to or otherwise correspond with" Pak. L235. Pezeshk did not state what Pak's response would be. He did not say that the response would not be that McKesson should comply with the "come to the company" requirement. Another possibility was that the board might excuse the requirement. Dadyar stated: "Although not obligated to do so, Pak Dairy occasionally made exceptions to its requirement that the dividends be collected as set out above. However, [McKesson] never formally requested such an exception in 1981 or thereafter and Pak Dairy never made such an exception to the requirement for [McKesson]." L301. McKesson, it is to be noted, submitted no legal opinion contending that under Iranian law Pak's board was obliged to make an exception in this case nor any evidence that the board in fact did so. As explained, n. 4, supra, absent positive evidence to the contrary, an Iranian court would rule that the shareholders were bound by the "come to the company" requirement.[7]

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ready to pay the outstanding dividends in late 1981 had preclusive effect. PA 97a.

[7] There is no "inconsistency" between the existence of the "come to the company" requirement and the lack of a reference to the

Whether Dadyar found minutes or other evidence in Pak's files showing that Pak's directors had "exercised" and "adopted" the requirement, see CP 18-19, depends on the proper translation of "*moradje'e.*" Ruling on McKesson's motion, the district court was bound to resolve the question in Iran's favor. In consequence, there was no reason for Dadyar to explain. In any event, there was an obvious explanation. According to Dadyar the requirement had been in effect "since long ago." L300. The document may have been lost. McKesson never explains why this is material. Iran's many unopposed affidavits and legal opinions demonstrated that the lack of such a document would have no significance under the controlling law, the law of Iran. As shown, supra, n. 4, an Iranian court would enforce the requirement without such a document.

Neither of the cases on which McKesson relies here, CP 19, supports its position in this case. We agree that a nonmoving party cannot create a genuine issue of material fact sufficient to withstand summary judgment by submitting an affidavit that contradicts a prior affidavit of the same party, absent an explanation sufficient to permit a fact finder to rule in its favor. Here, the affidavits are not contradictory; a sufficient explanation has been provided; and overwhelming other evidence submitted by Iran show that Iran's position is correct.

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requirement in the Articles of Association. Contra, CP 18. The Articles provide that the board of directors will choose the mode of payment, if it is not chosen at the general meeting. See PA 110a-111a. It is not "inconsistent" with that provision that the Articles do not then go on to specify what the mode of payment will be. Quite the contrary.

3. THERE IS NO BASIS IN IRANIAN LAW FOR MCKESSON'S FUTILITY ARGUMENT.

McKesson's "futility" argument, CP 19-23, suffers from two general faults. First, the legal standard against which the evidence supporting futility is to be measured is never explained. As we have said, P 20, both McKesson and Iran relied in the courts below on non-discriminatory Iranian law for purposes of deciding whether McKesson's shareholding interest was taken. Iran submitted two legal opinions that an Iranian court, acting without discrimination, would not accept a futility defense to the "come to the company" requirement on the facts of this case. JA 433; JA 448-451. McKesson did not submit a legal opinion of Iranian law to the contrary. Its futility argument was properly rejected on this ground alone. See P 25.[8]

Second, the evidence tendered to support futility is not directed to the specific situation in question, viz., whether it would have been futile for McKesson to comply with Pak's "come to the company" requirement beginning in the Fall of 1981, when Pak, as the Tribunal found, L247, "stated its readiness to pay, in Rials, the dividends." The evidence showing Iran's hostility to U.S. investment before 1981 or hostility to other U.S. investments in 1981 or thereafter, see CP 20-21 and nn. 10-11, is beside the point.

Specifically, contrary to McKesson's assertion, CP 21, Mr. Vahdati's April, 1981, request for dividends at a Pak board meeting did not comply with the "come to the company"

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[8] We do not think that McKesson would fare any better under U.S. law. See, Randolph-Sheppard Vendors of America v. Weinberger, 795 F. 2d 90, 105 (D.C.Cir. 1986)(failure to exhaust administrative remedies only excused where adverse decision "certain").

requirement. To comply with the requirement, a shareholder, or its representative, must come to the company within the time period appointed with appropriate identification. The dividend check is then exchanged for a receipt especially prepared for the purpose. L-0330. A representative of a shareholder must show that he has authority to collect the dividend. L-297-298. Six proxies authorizing Vahdati to vote at Pak's shareholders' meetings are attached to the Pezeshk Affidavit. See L-228, ¶7. There is nothing in the record showing that Vahdati had authority to collect dividends in accordance with the "come to the company" requirement. Even if he had had authority, he was too late to pick up the 1978 and 1979 dividends (evidently declared in April, 1980), and too early for the dividend principally in issue in this case. The dividend declared for the year 1980 was not ready for pickup by any shareholder until October 31, 1981. No representative of McKesson came to pick up the dividend for that year or any year following. Therefore, the dividends were credited to McKesson on Pak's books in accordance with Pak's articles and the Commercial Code. L255-256; 297-298.

McKesson also argues that the November, 1981 telex was just an offer to "negotiate," and cannot be read as an offer to pay the dividends. CP 21-23. The telex relevantly states: "As regards the payment of your dividend, this company has repeatedly announced its readiness for taking proper measures but you have not taken appropriate action in this regard. If you really mean to settle this issue, you can introduce your plenipotentiary representative to us so that necessary steps may be taken according to the current regulation." L137. The Tribunal read this to mean that Pak was "ready" to pay the dividends in its final ruling on the merits after trial. L204. We do not see how the telex can be read not to at least raise a genuine issue as to whether Pak was ready to pay the dividends in a pre-trial ruling where Iran was entitled to the benefit of

every reasonable inference.

In any event, an offer to "negotiate" does not exclude a willingness to pay the dividend. Even as characterized in McKesson's note 12, CP 22, it was McKesson, not Pak, that finally refused to negotiate in Vienna, and McKesson that withdrew its directors from Pak's board over Pak's protests in 1981. Even leaving aside McKesson's burden on summary judgment and viewing the question merely as one of common sense, any doubts as to what would have happened if the negotiations had gone forward or if McKesson had not withdrawn its directors from the board should be resolved against McKesson.

Iran submitted three affidavits on the futility issue. Dadyar twice stated that if McKesson had complied with the "come to the company" requirement in 1981 and thereafter, that Pak would have paid the dividends. L260-261, 301. Dr. Vafai, the expert on Iranian law at the U.S. Library of Congress, agreed. He explained that in his judgment it would not have been futile to comply with the "come to the company" requirements in 1981 to obtain the dividends, for many reasons. Notable among these reasons were (1) it was in Iran's and Pak's economic interest to pay the dividends in rials once the Tribunal had been established with a designated security account - in dollars - to pay any judgment, and (2) McKesson had technology and other information that was useful to Pak. JA 454-455, ¶4.[9]

Finally, Iran's position on this point was preserved in an

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[9] We are lodging under seal with the Clerk of this Court documents that were sealed by the district court showing that, at least in 1981, it was McKesson that cut off commercial relations with Pak, not the other way around. See P 7 and n. 2.

detailed statement of genuine issue. JA 374-379. Iran's position was that the expropriation was faked. As set out in counsel's Rule 56(f) affidavit, "McKesson was well aware how dividends were paid under Iranian law, but chose not to pick up its dividends so as to bolster its position before the Tribunal." JA 383, ¶5. Iran requested discovery on this issue, which the district court denied. Even if Iran was not entitled to summary judgment on futility - because it established by unopposed legal opinions that that is how an Iranian court would rule - Iran had clearly raised a genuine issue of material fact.

II THE SIMPLE INTEREST AWARD DOES NOT MERIT REVIEW.

A. THE ARGUMENT ON WHICH MCKESSON RELIES IN THIS COURT WAS NOT DEVELOPED BELOW NOR IS THERE ANY OTHER FACTOR IN THIS CASE THAT WOULD MERIT REVIEW OF THIS ISSUE BY THIS COURT.

McKesson's principal argument in the court of appeals was that compound interest should have been awarded because the Treaty of Amity, which requires "just compensation" representing the "full equivalent" of the property taken, required it. Even if the Treaty did not trump customary international law ("CIL"), CIL permitted compound interest in appropriate cases, of which this was one. In one paragraph in its opening brief, p. 65, and in one repetitive paragraph in its reply, p. 31, McKesson argued that federal common law required the district court "to make plaintiff whole," the argument McKesson makes here, CP 23-29.

Iran's response in the court of appeals was that the Treaty did not address the issue of compound interest at all; CIL

therefore controlled; under CIL only simple interest could be awarded; if CIL permitted compound interest awards, the district court properly exercised its discretion to award only simple interest.

The court of appeals ruled that compound interest was allowable under CIL, but the district court had properly exercised its discretion in awarding simple interest. PA 17a-19a. In its concluding paragraph, the court of appeals noted:

> ... It is true, as McKesson points out, that some federal common law principles require courts to "make the plaintiff whole." Appellee's Opening Br. at 65. Even if these principles support awards of compound interest in tort cases, however, they fall well short of proving that the district court abused its discretion, particularly in light of the court's reliance on a far more relevant authority: the decisions of the Claims Tribunal, which invariably awards simple interest.

Thus the issue which McKesson presents here was at most a subsidiary one below that was not extensively briefed nor extensively ruled upon by the court of appeals. Nor has McKesson explained that there is another factor in this case, such as a split in the circuits, that should motivate the Court to grant certiorari on this issue. Finally, as we show below, the court of appeals ruling is manifestly correct.

B. THE COMPOUND INTEREST ISSUE WAS CORRECTLY DECIDED BOTH BY THE DISTRICT COURT AND THE COURT OF APPEALS.

McKesson cites the court of appeals opinion, PA 17a-18a, for the proposition that "There is no settled principle of customary international law governing the availability of compound prejudgment interest." It then cites the district court's opinion, PA 79a, for the proposition that where "such a rule is lacking in a case otherwise controlled by international law, federal courts apply federal common law." CP 23.

McKesson's mischaracterizes the court of appeals' opinion. Although the court never committed itself unequivocally, it stated that "most contemporaneous sources" take the view expressed in the Third Report on State Responsibility Submitted to the International Law Commission of the United Nations, 2 Y.B.I.L.C. 50 (2000), to wit, "although compound interest is not generally awarded under international law or by international tribunals, special considerations may arise which justify some element of compounding as an aspect of full reparation." PA 18a. Thus, the court of appeals' view was not that there was no settled principle of international law. The settled principle was that compound interest would not be awarded absent "special" circumstances which "may" arise justifying "some" element of compounding.

McKesson's reliance on the district court opinion, at PA 79a, for the application of federal common law where "such" a customary international law principle is lacking, is misplaced. The district court's opinion, at PA 79, was addressing the "rate" of interest, not the availability of compound interest. Nor do any of the three cases that McKesson then cites, CP 23-24, suggest that federal common law controls because there is no

customary international law rule on the availability of compound interest.[10]

A number of federal cases, applying U.S. or domestic state law, have awarded compound pre-judgment interest. See CP 24, first full paragraph. However, in West Virginia v. United States, 479 U.S. 305 (1987), and General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983), the issue presented was not whether compound prejudgment interest should be awarded but whether prejudgment interest should be awarded at all. The circuit court authorities cited, which include cases from only two circuit courts, are insufficient to establish, as McKesson contends, that "the court [sic] of appeals have developed a rule of federal common law that includes a strong presumption in favor in compound prejudgment interest." Id.

Moreover, only one of the cases cited by McKesson -- Amoco Cadiz – involved foreign parties. The Seventh Circuit there said that "prejudgment interest is an element of damages," and "[r]ules for prejudgment interest therefore usually come from the law defining the elements of damages." Id. at 1233. As McKesson notes, the district court in that case nevertheless applied American law to the French plaintiffs' request for pre-judgment interest, and the court of appeals affirmed, but that

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[10] The first case, Forman v. Korean Air Lines Co., Ltd., 84 F.3d 446, 450 (D.C. 1996), which the district court also cites, PA 79a, addresses the issue whether the proper compound interest rate is the prime rate, not whether there should be compound interest. The next, In the Matter of: Oil Spill by Amoco Cadiz, etc, 954 F.2d 1279, 1333 (7th Cir. 1992), is, at page 1333, addressing the rate of compound interest to be awarded, not the availability of compound interest. The third, Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 950-952 & n. 162 (D.C.Cir. 1984), at the pages cited, addresses whether the court should engage in interest balancing in determining jurisdiction to prescribe anti-trust laws. It does not address interest at all.

was only because the French plaintiffs and Amoco agreed to the application of domestic U.S. law. Id. However, where British law applied to the cause of action, the court of appeals applied British law, which does not allow for compound interest. Id. at 1135-1336. Thus, Amoco Cadiz supports the district court's and the court of appeals' position that customary international law controls the determination whether compound interest should be awarded, rather than, as McKesson argues, federal common law.

We agree that a district court's discretion should be guided by legal principle and that, in reviewing for an abuse of discretion, an appellate court should consider whether the district court failed to consider a relevant factor, relied on an improper factor, or gave reasons that do not reasonably support its decision. See CP 25, first full paragraph. The district court's exercise of discretion on this issue clearly passes these tests.

McKesson has mischaracterized the court of appeals' ruling on the obligation to make plaintiffs whole. The court ruled only that "some federal common-law principles require courts to 'make the plaintiff whole,'" PA 19a, emphasis supplied, not that "federal common-law principles" in general so required or that those principles applied in this case. Contra, CP 26. The negative inference of "some" do is that "some" don't.

McKesson's representations as to how it has been damaged by Iran's claimed expropriation are not convincing. According to McKesson, this Court should view McKesson as not having received $7,000,000 in April, 1982 that it was entitled to receive and should therefore award McKesson interest equivalent to the interest it would have received on $7,000,000 if it had that additional amount of money to invest in the United States. According to McKesson, it "realized annual compound returns on its equity averaging more than

9%." CP 26. This, according to McKesson, justifies an award of compound interest at a similar rate, so that the final judgment against Iran should be raised from $20,000,00 to $36,000,000.

However, considering the theory on which McKesson established the purported expropriation in this case, an award of compound interest would have been unjustified. McKesson was awarded damages for expropriation on the argument that Pak failed, in 1981 and thereafter, to deposit McKesson's dividends in Iranian rials in a bank in Tehran. If the district court was correct that Iran expropriated McKesson's interest in Pak in April, 1982, by refusing to allow Pak to deposit McKesson's dividends in an Iranian bank, it seems unlikely that Iran, if it had overlooked the transfer of the rials to a bank account, would then have exchanged those rials into dollars and have done so at the most favorable rate of exchange. This, however, was the theory upon which the district court awarded compensation for the 1981 and 1982 dividends and determined the rate of exchange. See PA 76a.

A far more likely scenario is that the rials would have sat in the bank account in Tehran, added to annually by Pak, but never moving on to the United States. Iran generally disfavors interest and was unlikely, we submit, to make an exception for McKesson, so McKesson would have received little or no interest on the dividends, much less the 9% compounded it claims to have received in the U.S. The rate of inflation in Iran was extremely high from April, 1982, the date of the supposed expropriation, through May, 2000, the date of the district court's judgment. Roughly speaking we estimate that an Iranian rial purchased between 1% and 5% as many U.S. dollars in May, 2000, as it had in April, 1982, depending on whether one

obtained the favored rate or the market rate.[11] It is unclear that the value of the accumulating dividends in U.S. dollars, had Pak paid them into a bank account, would even reach into the hundreds of thousands of dollars, much less the roughly $27,000,000 that McKesson claims for pre-judgment interest. Contra CP 24, n. 13.

McKesson's statement that Iran has had "unfettered use" of the amount found by the district court, CP 26, is also wrong. McKesson's dividends were credited to McKesson on Pak's books. It may be fairly said that Pak had some use of the money, but it is hard to see how "Iran" had the use of it at all. If the amount of interest to be awarded is to be determined either by the amount that McKesson was actually damaged or the amount by which Iran profited, the amount that should be awarded is far less than the roughly $11,000,000 it has already been awarded as simple interest.

McKesson's argument continues on the assumption that

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[11]The district court set the exchange rate for the 1982 dividend at 84.45 rials per U.S. dollar, P 76a, the official rate provided by the Iranian Central Bank for favored transactions, although Iran had put in evidence that the 1982 market rate was about 350 rials per dollar, JA 958. According to a reliable source, between 1982 and 1997, the average yearly rate of inflation of consumer prices in Iran was about 20%. International Financial Statistics Yearbook, 1998, pp. 124-125. We have been informed but cannot confirm with certainty that, as of May, 2000, the date of the judgment, the official rate was about 1750 rials per dollar and the market about 5 times that. As of July 23, 2002, an internet source reports an "Interbank rate" of 1741.25 rials per U.S. dollar, www.oanda.com.. We have been informed, however, that this is the old favored rate, which has been abolished. We are also informed that the website of the Central Bank of Iran, www.cbi.ir shows only one rate, 7,926 rials per dollar, said to be a market rate. We cannot access the Central Bank site, but Iran's country page at www.imf.org contains documents confirming that now there is only one, market-based rate.

the applicable rule is that the district court should have awarded it compound interest because that was "required" to "make it whole" pursuant to federal common law or the Treaty of Amity. CP 27-28. However, neither of these sources of law "re[illegible] payment of compound interest. The federal common law rule grants the courts discretion. The principle governing this discretion is customary international law, because that is the body of law "defining the elements of damages." See, Amoco Cadiz, supra, at 1233. Customary international law allows compound interest only rarely.[12]

The court of appeals found that the phrases, "just compensation" and "full equivalent" in the Treaty of Amity, on which McKesson relies, CP 27, were "far too ambiguous to require awards of compound interest." PA 17a. In a legal opinion attached by Iran to its reply brief in the court of appeals, Professor Crawford, Special Rapporteur on State Responsibility for the United Nations International Law Committee, gave as his opinion that the Treaty does not even address the question of interest. Crawford Opinion, p. 5. Even if the Treaty did, it should be noted that the Treaty was ratified in 1955. At that time, as McKesson points out, CP 24, 28 U.S.C. §1961(b), the United States statute providing for post-judgment interest awarded only simple interest. As far as we know, Iran's domestic law has never provided for the award of compound interest. Clearly, Iran did not agree in the Treaty to awards of compound interest.

Finally, McKesson argues that it was "improper" to consider how other international tribunals have ruled on this

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[12] Carrying this argument one step further, one could argue that customary international law chooses non-discriminatory Iranian law as the law to be applied. On that argument, McKesson was entitled to no interest at all.

issue. CP 28. McKesson's argument here is that the district court should have followed the rule announced in Dynamics Corp. v. United States, 766 F.2d 518, 520 (Fed. Cir. 1985), and ITT Corp. v. United States, 17 Cl.Ct. 199, 242 (1989), rejecting district court decisions relying on "traditional" and "time-honored" practices. However, in those cases the district courts relied on "traditional" and "time-honored" practices that had been rejected by appellate courts and by the economic consensus prevailing in the United States as to the meaning of "making the plaintiff whole." Neither these authorities, nor this economic consensus, exist in the international economic arena. Contrary authorities and a contrary consensus exist. Crawford Opinion, pp. 5, 7-8, 10-11. In consequence, the district court's reliance on this consensus and these authorities was not only proper, it was "required" in a case brought under customary international law.

CONCLUSION

For the foregoing reasons, McKesson's cross-petition for certiorari should be denied.

Respectfully submitted,

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Of Counsel

Dated: July 24, 2002

APPENDIX

APPENDIX

APPENDIX A

MEMO TO PAK'S ACCOUNTS
DEPARTMENT FROM THE MANAGING
DIRECTOR, DATED OCTOBER 31, 1981 ..... 1a

APPENDIX A

Pak Dairy Company

Date: 9.8.1360(31.10.1981)

To: Accounts Department
From: The Managing Director

The company's board of directors in its meeting held on 5.8.60 (27.10.1981) had approved distribution of profits among the shareholders for the previous fiscal year by the last day of the legal time limit, with due consideration to the company's financial resources.

The foreign shareholders' profits will be credited to their account as in the past so that it could be paid to them upon their coming to the company.

Managing Director
Mohammad Reza Khobeyri
(sgd.) 31.10.1981

cc: Internal Audit Department File

(Handwritten marginal note:
Mr. Dadyar,
Please take action.
Share dividend of the shareholders
who did not come last year to
collect their cheque as well as
the dividend of Mr. (illegible) be
transferred to Account No. 2020.
sgd.)